Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors (No 3)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-24-474 OF 1998
KAMALANATHAN RATNAM J
5 MAY 2000

Evidence *— Affidavit — Use in evidence — Conflicting affidavits — Failure to cross-examine deponents — Whether evidence contained in affidavits sufficient to support plaintiffs' claims*

The plaintiffs brought an action alleging that the defendants had failed and/or refused to return documents and vehicles belonging to the first and second plaintiffs, based on conversion and detinue and for damages for conversion to be assessed. The issue was whether the plaintiffs' claims, based purely on affidavit evidence, had been proved.

Held, dismissing the plaintiff's application:

Whilst affidavits from each side abound with conflicting and variable views, the plaintiffs did not seek to cross-examine any of the deponents who affirmed the affidavits on behalf of the defendants (see p 616ID); *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 and *Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54 followed. In the circumstances, as the court had to ignore all matters of conflict, there was almost nothing in the affidavits to support the plaintiffs' case in conversion and detinue (see p 617B).

[Bahasa Malaysia summary

Plaintif-plaintif telah memulakan tindakan dengan mendakwa bahawa defendan telah gagal dan/atau enggan untuk mengembalikan dokumen-dokumen dan kenderaan-kenderaan milik plaintif-plaintif pertama dan kedua, berdasarkan konversi dan detinu dan untuk ganti rugi terhadap konversi ditaksirkan. Persoalan adalah sama ada tuntutan-tuntutan plaintif-plaintif, yang berdasarkan semata-mata atas keterangan afidavit, telah dapat dibuktikan.

Diputuskan, menolak permohonan plaintif tersebut:

Meskipun afidavit-afidavit daripada kedua-dua pihak penuh dengan pandangan yang bercanggah dan berubah-ubah, plaintif-plaintif tidak memohon untuk memeriksa-balas mana-mana deponen yang telah mengakui afidavit-afidavit tersebut bagi pihak defendan-defendan (lihat ms 616D); *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 dan *Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54 diikut. Di dalam keadaan tersebut, memandangkan mahkamah telah tidak memperdulikan semua perkara-perkara yang bercanggah, tidak ada apa langsung di dalam

A afidavit-afidavit tersebut yang menyokong kes plaintif-plaintif berhubung konversi dan detinu (lihat ms 617B).]

Notes

For cases on use of affidavits in evidence, see 7 *Mallal's Digest* (4th Ed, B 1995 Reissue) paras 128–130.

Cases referred to

Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54 (folld)

C *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] 5 MLJ 688 (refd)

Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors [1999] 6 MLJ 342 (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (folld)

D *Wong Kian Kheong* (*Andrew Chiew* with him) (*Lee Hishamudin*) for the plaintiffs.

Conrad Young (*Azman Davidson & Co*) for the defendants.

Kamalanathan Ratnam J:

E *Facts*

The facts of this case have been twice set out by me in two earlier judgments (see *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] 5 MLJ 688, judgment delivered on 31 March 1999 ('the first judgment') and *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] F 6 MLJ 342, judgment delivered on 7 June 1999 ('the second judgment')).

The plaintiffs' claim

All the plaintiffs have brought an action alleging that the defendants have failed and/or refused to return, inter alia, all files, documents, accounts and G vehicles belonging to the first and second plaintiffs, based on conversion and detinue and the plaintiffs thus prayed for delivery of the same and for damages to be assessed.

Findings of the court

H This application can, in my view, be dealt with on one issue.

Inter-laced factual matrix

The plaintiffs' entire claim is based on their pleaded factual matrix. However, the plaintiffs in their wisdom have thought it best to proceed to I prove their claims for conversion and detinue purely on affidavit evidence. To my mind this is totally an incorrect approach, more so when each fact has been challenged. Let me illustrate. This concerns the vehicles of the first

and second defendants. Whilst the defendants do not deny that there were various requests made for the return of the said vehicles they point out that there was an understanding reached between the fourth plaintiff and the first defendant in respect of certain vehicles. Whilst admitting that the understanding had referred to various other vehicles and not the vehicles demanded, the defendants notwithstanding, assert that the clear inference was that there was some deal between the plaintiffs and the defendants in respect of all vehicles. The plaintiffs have however specifically disputed this so-called understanding. In any case, the vehicles have since been returned. Whilst conceding to this fact the plaintiffs still contend that they are entitled to damages for conversion.

When this court granted the plaintiffs the ex parte mandatory injunction and when it was served on the defendants, the defendants immediately complied by returning the vehicles. To my mind, it is incorrect to hold the compliance with the order of the court as evidence of conversion. The tort of conversion has to be proved.

This then brings me back to the only issue that I need consider. Whilst affidavits from each side abound with conflicting and variable views, the plaintiffs did not seek to cross-examine any of the deponents who affirmed the affidavits on behalf of the defendants. In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, in the context of winding-up petitions tried by way of affidavit evidence, the Privy Council held that in the absence of cross-examination, the court must ignore credibly disputed allegations. Kang Hwee Gee J adopted this principle in *Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54. This is what his Lordship said at p 61:

> But even assuming that the affidavit in support is not irregular and can be accepted for what it is worth, the plaintiffs' summons would still have to be dismissed as the opposing claim of the parties in their respective affidavits as to what actually transpired has led to a stalemate which could only be resolved if the deponents appear to be examined and cross-examined as in a writ action.
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> It should have been obvious to the plaintiffs that they should not have begun this action by originating summons but by writ as their claim was bound to be fairly contentious and a substantial dispute of fact could be expected. Having commenced this action by originating summons it was still open to the plaintiffs to apply under O 28 r 8(1) of the RHC to convert the originating summons into a writ action or at the very least to apply under O 38 r 2(3) to cross-examine the deponents of the defendants' affidavit, although such emergency repairs are not usually condoned by the courts which may disallow any such application (see *Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 4 MLJ 764). Neither of these avenues, however, were resorted to by the plaintiffs. As it is, in assessing the plaintiffs' case, I would have to apply the restrictive mechanics of evaluation of affidavit evidence as set out in the Privy Council case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, which reads as follows:
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> > 'If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the

A disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.'

I think that this is a very sound principle. When two opposing views are presented to the court by way of affidavit evidence, the court is deprived of the basic rule of prudence, when testing the veracity of a party, by being B allowed to observe the witnesses' demeanour, candour and conduct when testifying. When all things are equal, these observations can tilt the evidence. I have merely illustrated with one example of the conflict in the evidence. In the circumstances, as I have to ignore all matters of conflict there is barely nothing in the affidavits to support the plaintiffs' case in conversion and detinue. I therefore dismiss the plaintiffs' application with C costs to be taxed.

Plaintiff's application dismissed.

Reported by Ezatul Zuria Azhari

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